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March 29, 2000

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

**Re: MM Docket No. 98-204**

Dear Ms. Salas:

On March 29, 2000, the National Association of Broadcasters ("NAB") filed the attached letter with the Office of Management and Budget ("OMB") concerning the Commission's request for approval of the information collections in connection with the above-captioned proceeding. Please reference the attached with MM Docket No. 98-204.

Any questions should be referred to the undersigned.

Respectfully Submitted,

*Lori Holy*

Attachments

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ORIGINAL

March 29, 2000

**VIA COURIER**

Mr. Edward Springer  
United States Office of Management and Budget  
New Executive Office Building  
Room 10236  
17<sup>th</sup> Street and Pennsylvania Avenue, N.W.  
Washington, D.C. 20503

**Re: U.S. Office of Management and Review of Information Collection Clearance Requests  
Submitted by the Federal Communications Commission**

OMB Control No. 3060-0113 (FCC Form 396)  
OMB Control No. 3060-0390 (FCC Form 395-B)  
OMB Control No. 3060-xxxx (FCC Form 397)  
OMB Control No. 3060-xxxx (Election Statement)  
OMB Control No. 3060-0212 (Section 73.2080 Equal Employment Opportunity Program)

Dear Mr. Springer:

The National Association of Broadcasters ("NAB")<sup>1</sup> submits comments on and opposes many aspects of the above-captioned clearance requests now before the Office of Management and Budget ("OMB"). All these requests relate to the implementation Federal Communications Commission's *Report and Order* in MM Docket Nos. 98-204 and 96-16.<sup>2</sup>

The requests involve new and reinstated reporting forms, recordkeeping requirements and substantive regulations – each imposing significant paperwork obligations on radio and television broadcasters.

**Overview**

To put these FCC requests in context, we point out that the Commission's *Report and Order* – which the FCC has appended to each of its clearance requests – marks the FCC's attempt to

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<sup>1</sup> NAB is an nonprofit, incorporated association of radio and television broadcast stations and broadcast networks. It serves and represents the American broadcasting industry.

<sup>2</sup> *Report and Order* in MM Docket Nos. 98-204 and 96-16, \_\_\_ FCC Rcd \_\_\_ (2000). The *Report and Order* was released by the FCC on February 2, 2000. A synopsis of the *Report and Order* was published in the *Federal Register* on February 15, 2000. (65 Fed. Reg. 7448).

replace an equal employment opportunity affirmative action scheme that was declared unconstitutional by the United States Court of Appeals for the District of Columbia Circuit, in *Lutheran Church – Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998), *pet. for reh'g denied*, 154 F.3d 487 (D.C. Cir. 1998), *pet. for reh'g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998). There the court found that the affirmative action aspects of the FCC EEO regulatory system required broadcast licensees to use race and gender in categorizing job applicants and in making hiring decisions. On these and other bases the court declared that regulatory system to be unconstitutional.

The Commission's *Report and Order* makes only cosmetic changes to some of the aspects of the former EEO regulatory program that was invalidated by the court. Of even greater concern, the Commission then piles on a series of additional paperwork requirements and regulatory burdens that go well beyond what it had required prior to the *Lutheran Church* ruling. As we will point out below, OMB must reject these additional – and in many ways redundant – requirements.

Also to establish the context for OMB review of the Commission's broadcast-related clearance requests we refer to the earlier – and now terminated – FCC efforts to reduce the regulatory burdens of its pre-1998 EEO regulatory program. That is, even prior to the court's ruling in *Lutheran Church*, the FCC began a process of regulatory reform and "streamlining" of its EEO rules and paperwork/recordkeeping requirements. See *Streamlining Broadcast EEO Rule and Policy*, MM Docket No. 96-16, 11 FCC Rcd 5154 (1996). There the Commission had proposed a variety of reforms that would reduce the regulatory and paperwork burdens on broadcasters, particularly small broadcasters.

What the OMB now has before it are: (1) the Commission's attempt to craft new EEO rules in light of the court mandate; and (2) the "termination" of efforts to make less onerous the Commission's EEO program requirements for broadcasters. Indeed, what the OMB is reviewing – and we believe must reject – is the complete opposite what would be expected from an agency that had its EEO regulatory program invalidated by the court and had, on a separate track, inaugurated a rulemaking proceeding and received comments on reducing its EEO regulatory burdens.<sup>3</sup>

### **The Report and Order Imposes Wholly Unjustified Regulatory Burdens**

The essence of the *Report and Order* is the imposition of largely redundant and unjustified paperwork burdens and reporting requirements. The new EEO regulatory program is laden with repetitive, duplicative "paperwork for the sake of paperwork" requirements. Indeed, this revised regulatory program takes on a punitive character. The text of the agency's decision suggests that there is some pattern of malfeasance among broadcasters that supports the imposition of increased regulatory and monitoring burdens. But there has been no such pattern of discrimination or other EEO-related failings of the broadcasting industry. In fact, the opposite is true.

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<sup>3</sup> NAB filed a Petition for Reconsideration in MM Docket No. 98-204 on March 16, 2000 addressing many of the same concerns outlined below. NAB's Petition is included herein as Attachment A.

In response to the FCC submissions, we offer the following comments that provide more than sufficient basis for the OMB to reject the FCC's revised broadcast EEO reporting and recordkeeping regime as far too excessive. Moreover, the true impact and regulatory burdens created by this revised regulatory scheme are not described realistically in the *Report and Order* nor in the submissions the FCC has sent to OMB for approval.

To give a clear perspective on how the Commission's revised EEO regulatory scheme is far more burdensome than the one invalidated by the court, we point to a "side-by-side" comparison of the regulatory, recordkeeping and reporting requirements embodied in the new and former FCC EEO approaches. This comparison, offered as Attachment B to these comments, graphically demonstrates the Commission's failure to meet the standards imposed by both the Regulatory Flexibility Act and the Paperwork Reduction Act. It has increased the paperwork burden. And although the agency has maintained the "exemption" of *very* small stations from the bulk of its paperwork requirements, it is important to note that the vast majority of broadcast stations, particularly radio stations, meet the Small Business Size Standards established by the Small Business Administration. Thus, thousands of small businesses would be subject to these onerous and unjustified regulations.

Moreover, and as we address by offering several examples below, the Commission truly has not "thought through" what it has required in the rules and on its reporting forms. There are several inconsistencies and obvious mistakes. Similarly, the FCC has submitted to the OMB a series of burden estimates that simply are unrealistic. They undercount the number of hours that each station must give to each task, and ignore the level of care and thoroughness that broadcasters must give to compliance in a regulatory area that in the past has been the prime issue for license renewal challenges.

#### **Comments on Individual FCC Submissions**

Below we address briefly several of the broadcast-related Paperwork Reduction Act Submissions that OMB has received from the FCC. These requirements should be viewed and assessed in the aggregate – as parts of an excessive body of new and expanded regulatory burdens.

#### **OMB Control No. 3060-0212 (Section 73.2080 Equal Employment Opportunity Program)**

The new rules are substantially more burdensome than the former EEO regulations, as shown in Attachment B. Moreover, the FCC has not shown any legitimate basis for the increase in these burdens.

Under Option A of the Commission's program rules, a station must conduct a combination of recruiting for each vacancy *and* performing large numbers of supplemental\alternative recruitment tasks. The stations must maintain extensive records to prove compliance. Under Option B, stations are required to recruit for every job vacancy and keep detailed records on the race and gender of every applicant for every vacancy, in addition to the records to prove they have widely disseminated job vacancy information.

Under either option, stations must prepare and maintain an annual EEO Public File Report. This report details the exact methods and results of the prior year's EEO recruitment efforts. The report must be maintained in the station's public file and on the station's website, if it has one.

This is a new – and burdensome – requirement for stations. Never before has the Commission required the maintenance of such documents in the station's public file and on the Internet. There is no reasoning in the *Report and Order* that justifies this extensive recordkeeping and reporting requirement in addition to the other EEO requirements. It is another example of the burdensome, unnecessary and redundant regulations under the EEO rules.

Stations are also expected to periodically “self-assess” their recruitment efforts to verify effective outreach. The Commission expects stations to evaluate the data, records and outcome of each of its hiring situations and alter the recruitment program if it is determined to be ineffective. On top of all of this, the Commission also imposes numerous reporting requirements discussed in detail herein.

Despite the clear increase in the regulatory burdens, the FCC's OMB submission makes the incredible assertion that there will be a net *decrease* in the burden hours of its regulatory program. But, how can this be when the revised FCC EEO rules have added two new reporting forms and mandated a series of “supplemental” or “alternative” outreach requirements. Clearly, the new EEO program will impose a vast *increase* in burden hours on broadcasters.

It is absolutely unrealistic to argue, as does the Commission, that compliance with the FCC's greatly expanded EEO regulatory program will amount to only a one hour per week burden.<sup>4</sup> To comply with all these behavioral and recordkeeping requirements would be far more onerous -- particularly in light of the fact that stations traditionally must take great care to comply with FCC rules that have been the most frequent subjects of petitions to deny license renewals.

Under the Commission's new rules, the jeopardy for stations is not limited to the license renewal process. Each station could face complaints any day of an eight-year license term. With this Sword of Damocles hanging over each station, the level of care given to broadcasters' EEO-related tasks will be far more significant than the FCC's meager burden estimates would suggest.

Consistent with other aspects of its revised and seemingly punitive EEO program, the FCC has established an “open ended” set of requirements in that there is no “safe harbor.” No broadcaster is given an indication of what level of performance will ensure compliance with this EEO regulatory system. Instead, stations are left with the prospect of facing EEO-based challenges and complaints at any time, not just during license renewal. One would hope that meeting the Option A menu of supplemental recruitment measures would provide some expectancy of EEO rule compliance. But, the Commission has offered none. And for stations forced by necessity to choose Option B, there is an even greater level of uncertainty insofar as EEO rule compliance – and the insulation from license challenges and complaints – is concerned. The stations are forced to track applicant pools for minority and female applicants. The Commission has stated

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<sup>4</sup> The Commission estimates that half of the broadcast stations will opt for Option A and the other half will choose Option B. It further estimates that Option A will create an annual burden of 42 hours for broadcasters, while Option B imposes an annual burden of 52 hours. Obviously, the burden any particular station will experience will depend in part on how many job openings it has in a given year. But, under Option A, even stations that do not make any hires in a two-year period would still be required to undertake extensive outreach programs.

that despite a station's outreach efforts, if no or few minorities and female applicants are present in the pools, it would be grounds for non-compliance. Stations cannot force any individuals to apply for job openings – let alone minorities and females – but if none do, the station is potentially subject to sanctions. The Commission has stated it is focusing on the outreach, but reality bears a different result. Also, by leaving the “docket open,” the Commission has the ability to redefine the standard for compliance and continually “raise the bar.”

#### **OMB Control No. 3060-0113 (FCC Form 396)**

The FCC Form 396, filed with each station's critically-important license renewal application, has undergone many changes. In addition to the “cosmetic” changes, the Commission has added a new section that requires a narrative statement from the station that justifies why the station believes its EEO program has been successful in widely disseminating information concerning job openings. Clearly, putting pen to paper to describe and evaluate – in narrative form -- a station's efforts over an 8 year period will require a substantial amount of time. However, the Commission says that the time needed for completion of the report has been cut in half. This new burden estimate is a mere 90 minutes. This estimate clearly does not reflect the realistic burden that will result.

This form traditionally has been the key document in the certification and demonstration of a licensee's compliance with the FCC's EEO rules. And as noted elsewhere in these comments, compliance with FCC EEO requirements has become the *sine qua non* of obtaining renewal of the most valued asset of a broadcaster: the FCC license. To suggest that a station would dedicate only 90 minutes to this task is ludicrous. And to suggest further that the burdens of completing this form – one element of a greatly expanded FCC EEO regulatory scheme – have *decreased* similarly defies belief.

#### **OMB Control No. 3060-0390 (FCC Form 395-B)**

Given the many other elements of its revised EEO regulatory system, there is very little need for this reinstated annual report. Attempting to dodge the impact of the *Lutheran Church* ruling, the Commission says that it will not use these forms to compare individual station employment profiles with the local labor force as a “screening device” for license renewal decisions or otherwise. Indeed the FCC says it will not require stations to place these annual reports in their local public inspection files. Instead, the FCC insists that these forms only will be used to “monitor industry employment trends” and to “report to Congress.”

But, if the Commission only is seeking these data for monitoring trends and reporting to the Congress, why cannot the agency use a periodic sample, rather than a survey of *every* station *every* year. The FCC admits, “no statistical methods are employed” in an area that reasonably should be the subject of sampling and related statistical techniques.

Furthermore, obtaining data for monitoring industry trends *does not* necessitate the collection of station-specific information. Why should station call letters and licensees be associated with these data? As suggested in the NAB Petition, the FCC should have employed a “tear off” sheet that would have separated employment information from the identity of the station once the form established the fact that a station had filed.

Also, there is absolutely no need for the Commission to collect these data annually. The revised FCC Ownership Report (FCC Form 323), which, *inter alia*, collects information on the race and gender of officers, directors and cognizable stockholders of a licensee, is only required to be submitted on a biennial basis. Surely any FCC Form 395-B filing requirement should be no more frequent than meeting a biennial collection timetable. Additionally, if the Commission's interest truly is in monitoring trends, etc., it surely could obtain statistically relevant information from reviewing the EEO-1 data collected annual by the Equal Employment Opportunity Commission. Furthermore, the 1.0 hour burden per station estimate is completely unrealistic, given the level of information required and the traditional care that stations must give to *all* EEO-related forms and reports.

**OMB Control No. 3060-xxxx (FCC Form 397) and OMB Control No. 3060-xxxx (Election Statement)**

With the new FCC Form 397, the Commission has developed a redundant reporting requirement. Form 397 is a certification that a station has complied with the EEO rules over the past two years. In order to properly certify a station would be expected to self-assess its efforts and review all of its records before signing the form and submitting it to the Commission. Failure to properly certify is grounds for a misrepresentation to the Commission, subject to heavy fines and sanctions.

The need for this new form is questionable in light of the other reporting requirements under the new EEO rules. If stations are required to produce an annual EEO Public File report – available to anyone via station visits or over a station's website – why must it certify to the same information every two years? Alternatively, if the FCC requires a biennial certification of compliance, why must a station have an annual EEO Public File Report? Although NAB supports a simple biennial Statement of Compliance as the only reporting requirement for broadcasters in the EEO arena, stations should not also be required to document such compliance in additional annual reports. Again, the Commission has imposed one more *completely redundant* form.

Moreover, the Commission's burden estimate for this form is thoroughly fanciful. The FCC submits that each licensee will spend no more than half an hour in completing this form. As a form that could be used as part of a misrepresentation claim, it would be more realistic that a station will spent a substantial amount of time reviewing its procedures and records to properly certify it has complied with the EEO rules over the past two years.

Additionally, Form 397 also requires an election by the station regarding which recruiting option it will use over the next two-year period. The burden estimate does not reflect the real world situation facing many broadcasters. A reality check points to the obvious. Some licensees hold hundreds of licenses – and some both radio *and* television stations. Is each required to make the same supplemental/alternative recruitment measures choice? Of course not. Can a licensee use a single form for both radio and television stations? Again, the answer is no. Such licensees must fill out additional forms while increasing the potential burden beyond the miniscule estimate provided by the FCC in its request.

Furthermore, and particularly for larger group owners, can a determination of compliance for each station – with the prospect of forfeiture or even license revocation proceedings hanging on whether the licensee's certification was valid – be completed in only half an hour? Again, the answer is no. The FCC's OMB submission lists absolutely *no costs* to the government to analyze these documents. Does that mean that the Commission will not review them? If such is the case, there is no need for the reporting form at all.

And for initial and subsequent "election statements" the Commission suggests a three-hour burden, over two years. Again, this figure is far too low to constitute a realistic assessment of the amount of station staff and consultant/attorney time to make such a judgment.

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These new rules and paperwork requirements are scheduled to become effective on April 17, 2000. We urge the OMB to reject the Commission's information clearance requests, for the reasons stated above, and also to announce its decision prior to the effective date of the Commission's *Report and Order*. At the very least, the OMB, particularly in light of the judicial history of FCC EEO regulatory schemes, should postpone – pending completion of agency reconsideration and court appeals – any grant of approval to these regulations and to their expansive paperwork and reporting burdens.

Respectfully submitted,

**NATIONAL ASSOCIATION OF  
BROADCASTERS**

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Washington D.C. 20036  
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Henry L. Baumann  
Jack N. Goodman  
Lori J. Holy

cc w/enclosures: Judy Boley, FCC



**ATTACHMENT A**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Review of the Commission's	)	MM Docket No. 98-204
Broadcast and Cable	)	
Equal Employment Opportunity	)	
Rules and Policies	)	
	)	
	)	

**Petition for Partial Reconsideration and Clarification of the  
National Association of Broadcasters**

**NATIONAL ASSOCIATION OF  
BROADCASTERS**  
1771 N Street, N.W.  
Washington, D.C. 20036  
(202) 429-5430

Henry L. Baumann  
Jack N. Goodman  
Lori J. Holy

March 16, 2000

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## EXECUTIVE SUMMARY

The National Association of Broadcasters ("NAB") requests partial reconsideration and clarification of the Commission's recently adopted EEO rules. NAB believes the new EEO rules are substantially more burdensome than the former EEO rules with increased recruiting, recordkeeping and reporting requirements. In order to provide actual flexibility to broadcasters, the Commission must modify aspects of its rules.

Specifically, NAB requests that the Commission reduce burdens by eliminating its requirement to provide wide dissemination of information for every job vacancy. The record does not justify this requirement. Broadcasters have substantially complied with EEO regulations for 30 years, in which time minorities and women have made great strides within the industry. The Commission should allow broadcasters to focus their recruitment by eliminating its strict all-vacancy recruitment requirement.

Additionally, the Commission should reconsider requiring supplemental measures under Option A. The Commission adopted an option that requires wide dissemination of information for every job vacancy *and* a supplemental outreach requirement. The extent of the outreach requirements virtually eliminates Option A as a choice for many smaller broadcasters. Thus, the Commission should eliminate the all-vacancy recruitment rule. Alternatively, if the Commission maintains that requirement, it should eliminate the supplemental measures. Under any circumstance, a reduction in the number of required supplemental measures is necessary to allow for increased broadcaster participation.

The Commission should reinstate the former exemption for stations in areas with less than 5% minority population. Although the Commission justifies the elimination of this exemption on the fact that it does not require specific recruitment for minorities and females, but only to the

community, this cannot be balanced with the basis for implementation of EEO rules, nor with the Commission's goals.

The Commission wrongly discarded the Internet as a valid form of outreach. Internet access and use increase on a daily basis. Although minorities are not accessing the Internet as quickly as whites, studies show that these groups are more likely than other groups to access the Internet at public places and to use the Internet *to conduct job searches*. NAB asks that the Commission recognize the Internet as *at least one* method of wide dissemination so broadcasters can utilize and develop it as an effective recruitment tool.

NAB also believes the Commission can reduce the detailed recordkeeping and reporting requirements. There is no demonstrated need for all of the required reports. The Commission should reconsider requiring the annual public file report and biennial certification – keeping both is redundant. Further, never before has the Commission required any EEO documentation in the public file and the history of broadcaster compliance does not call for it.

Under any circumstance, the Commission should not require a broadcaster to place any EEO report on its website. There is no substantive reason given for the new requirement and it is contrary to Commission precedent regarding public file documents. It is inconsistent for the Commission to impose an Internet posting requirement for the benefit of a station's community when it will not allow broadcasters to use the same technology to recruit under the theory that the information will not be available to the community.

The Commission should reconsider its decision to reinstate the Annual Employment Report requirement. If the Commission retains the requirement, it should eliminate the ability to attribute the data to individual stations once it is filed with the FCC. Additionally, the Commission can reduce burdens by collecting the information biennially.

Finally, NAB asks the Commission to clarify (1) filing deadlines for Form 397; (2) a “safe harbor” for EEO efforts; (3) privacy concerns regarding recordkeeping and reporting; (4) the relationship between the FCC’s rules and state EEO laws; (5) joint recruitment efforts; and (6) recruiting exemptions.

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Review of the Commission's	)	MM Docket No. 98-204
Broadcast and Cable	)	
Equal Employment Opportunity	)	
Rules and Policies	)	
	)	
	)	

**Petition for Partial Reconsideration and Clarification of the  
National Association of Broadcasters**

**I. INTRODUCTION**

The National Association of Broadcasters ("NAB")<sup>1</sup> requests that the Commission partially reconsider and clarify aspects of its recently adopted *Report and Order* in the above-captioned proceeding.<sup>2</sup> NAB believes there is insufficient evidence in the record to justify the imposition of the substantial increase in EEO recordkeeping and reporting without consideration of the actual real world burdens of such regulations on broadcasters.<sup>3</sup>

In this petition, NAB asks the Commission to reduce or eliminate specific parts of its recruitment requirements and reinstate the 5% minority population exemption. Additionally,

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<sup>1</sup> NAB is a nonprofit, incorporated association of television and radio stations and broadcast networks which serves and represents the American broadcast industry.

<sup>2</sup> *Report and Order* in MM Docket No. 98-204, adopted January 20, 2000 [hereinafter *EEO Order*].

<sup>3</sup> Attached to this petition are statements from broadcasters that illustrate some of the burdens they face in complying with the new EEO rules. These are not the only examples of the real world impact of the increased regulation on broadcasters.

NAB requests that the Commission recognize the Internet as a valid form of recruiting and provide broadcasters with regulatory “credit” for engaging in such recruiting.

NAB believes the Commission has failed to consider the impact of its recordkeeping requirements on smaller stations. The Commission has imposed substantial requirements on broadcasters to prove they are in compliance with the regulations regardless of its long pending *EEO Streamlining* proceeding – the premise of which was that Commission’s old rules were burdensome on broadcasters – now, the new rules require the creation and retention of far greater records.

Additionally, the Commission has imposed new reporting requirements and reinstated old reports as part of its new “Zero Tolerance Policy” without any demonstrated need. The Commission can adequately monitor broadcasters with less reporting and enforcement than specified in the *Report and Order*.

Finally, NAB asks the Commission to clarify several portions of its new rules. Specifically, we request clarification on the filing dates for the certifications, whether there is a “safe harbor” for broadcasters’ recruitment efforts, and the relationship between the Commission’s rules and state EEO rules. The Commission should also provide guidance to broadcasters regarding specific supplemental recruitment efforts not outlined in the *Order*, privacy concerns for the publicly available reports, and other instances where recruitment is not feasible.



## II. ISSUES FOR RECONSIDERATION

### A. Recruiting Requirements Should Be Reduced and/or Eliminated to Provide Relief for Broadcasters.

#### 1. *The Commission should eliminate the requirement to recruit for every job vacancy.*

Under the new EEO rules, the Commission provides two recruitment choices for broadcasters – Option A and Option B. Under either option, broadcasters must recruit for every job vacancy through wide dissemination of vacancy information. The Commission apparently believes that this type of recruitment is the most effective way to meet its goal of increasing the number of women and minorities employed in the broadcast industry. *See EEO Order* at ¶ 164. The Commission justifies the all vacancy recruitment requirement because it believes that “women and minorities have historically experienced difficulties in finding out about, or taking advantage of, employment opportunities in the communications industry.” *EEO Order* at ¶ 76.

This assertion is completely unsupported by the history and facts. Broadcasters have substantially complied with EEO regulations for the last 30 years. In that time, as noted in the record of this proceeding, minorities and females have, in fact, made great inroads into the broadcasting industry. According to the Minority Media and Telecommunications Council (“MMTC”), there are several areas where they note that EEO regulations have succeeded and strict EEO enforcement may no longer be necessary. Comments of MMTC in MM Docket No. 98-204 at 48. These data are positive indicators that the Commission’s fear that broadcasters primarily use “word-of-mouth” recruitment (*i.e.* “the old boy network”) is unjustified. *See, e.g., EEO Order* at ¶ 99. In light of the fact that many minorities and women are currently employed at broadcast stations, does it not follow that minorities and women are likely to hear about job vacancies even if it is by “word-of-mouth”? The facts and the numbers are an indication that

minorities and women are employed in the broadcasting industry and that the FCC is unjustified in continuing to impose a recruitment requirement for every job vacancy.

Yet, the Commission continues to insist on regulating broadcast industry recruitment under all circumstances – even in situations where it may no longer be necessary because the Commission’s goal of increasing the number of women and minorities has been met. Streamlining the recruiting requirements for both options would allow broadcasters to focus their efforts in areas that would result in more effective outreach and decrease burdens.

**2. *The Commission should eliminate or reduce the number of supplemental recruitment measures under Option A.***

Under Option A of the Commission’s EEO rules, broadcasters must widely disseminate job information for every vacancy *and* also comply with specific supplemental recruitment measures. NAB believes such supplemental measures *in addition to* a requirement to recruit for all vacancies are burdensome and unnecessary. There is no justification to continue mandatory recruitment for all job vacancies. A requirement to conduct supplemental outreach measures on top of recruiting for every vacancy could eliminate Option A as a choice for many smaller broadcasters.

NAB suggested a “menu”-like system as an effective approach to EEO regulation. However, our proposal was intended to *replace* the former EEO recruiting requirements – it was not intended as a supplemental program. The Commission recognized the benefits of these alternative sources of outreach. *EEO Order* at ¶ 99. However, these efforts – if combined with the requirement to recruit for every vacancy – may be too burdensome for some stations to use.

The Commission should foster an environment where broadcasters can implement alternative forms of outreach. Such an environment would exist if the Commission were to eliminate the traditional recruiting requirement for all job vacancies from Option A. If the

Commission insists on continuing to require broadcasters to recruit for every job vacancy, it should then eliminate the requirement to conduct supplemental outreach efforts.

In any instance, NAB believes the Commission should reconsider its decision to require four (4) supplemental measures for stations with 10 or more full-time employees and two (2) supplemental measures for stations with less than 10 full-time employees. Although the Commission lists many choices to meet these requirements, the extent and burden of compliance is too great for many stations. For example, if a station were to choose to attend job fairs as one of its supplemental requirements, it would have to attend *four job fairs* in a two-year period in order for it to meet *just one* supplemental requirement. That same station would then be required to complete additional measures to properly certify it has complied with the EEO rules. For stations that have never participated in such programs in the past, beginning them now – in addition to recruiting for every job vacancy – is an unreasonable burden.

The Commission should reconsider its decision on Option A. NAB requests that the Commission eliminates the recruitment for every job vacancy provision, requiring broadcasters only to implement the supplemental measures. If the Commission insists on retaining the recruiting requirements, it should consider eliminating the supplemental measure requirements. Under any circumstance, it should reduce the number of supplemental measures to provide broadcasters with the incentive and ability to conduct the alternative measures instead of potentially eliminating Option A as a choice for many broadcasters.

***3. The Commission should reinstate the exemption for stations in areas with five percent or less minority population.***

In its *Order*, the Commission specifically removes the traditional exemption for stations that serve areas with less than five percent minority population. *EEO Order* at ¶ 131. It justifies removing the exemption because it states that the “EEO Rule emphasizes broad and inclusive outreach rather than recruitment methods that specifically target minority and female applicants.”

*Id.* This reasoning runs completely counter to the bases the Commission cites for implementing the EEO rules and to the ultimate goal of the Commission in enforcing the EEO rules.

The Commission spends many pages of its *Order* justifying its ability to impose EEO rules on a variety of different statutes and governmental interests – all of which are based on increasing minority and female representation in the broadcasting industry. *See, e.g., EEO Order* at ¶¶ 17 – 62. The Commission also concludes that it intends on evaluating the industry’s efforts, stating that “an increase in the number of women and minorities employed in the broadcast and cable industries would indicate that our EEO requirements are effective in ensuring outreach.” *Id.* at ¶ 164. It is only in the discussion of the actual EEO requirements where the Commission notes that broadcasters are required to conduct outreach to their “communities” without specifically targeting minorities and females. *Id.* at ¶ 77. This inconsistency places stations in areas with low minority populations at a disadvantage.

These stations may be unduly targeted for inquiries or sanctions through removal of the exemption. While the Commission notes that it cannot force minorities to apply for broadcast jobs in any instance, by removing this exemption, it is ultimately requiring these stations to find minorities where virtually none live. At a minimum, these stations will be unable to target their outreach efforts to local organizations working to encourage broadcast employment as the Commission expects (*id.* at ¶ 77) because there are not likely to be any such organizations in homogenous communities.

These stations already conduct their recruitment to their communities as the Commission expects. The reasoning for removing the exemption and the Commission’s ultimate goal are at odds with the affected broadcasters stuck in the middle. The Commission should reconsider its decision and reinstate the 5% minority population exemption.

**4. *The Commission should give broadcasters “regulatory credit” for utilizing Internet recruiting measures.***

Although the Broadcast Executive Directors Association (“BEDA”) presented the Commission with an EEO model program that would virtually ensure that all job vacancies in the broadcasting industry would be available to anyone who is truly interested in pursuing a career in broadcasting, the FCC rejected BEDA’s proposal as premature. *EEO Order* at ¶ 86. The Commission believes that the “digital divide” is a barrier that prevents Internet-based methods from reaching “all segments of the community” and that the newness of the sites does not ensure wide dissemination. *Id.*

The National Telecommunications and Information Administration (“NTIA”) completed a comprehensive study in 1999 of the digital divide. *See Falling Through the Net: Defining the Digital Divide*, NTIA/U.S. Department of Commerce, July 1999 [hereinafter NTIA Study]. The study found that Internet usage increased depending on education. Nearly 62% of U.S. persons with a B.A. degree or more, and 42.5% that have some college education use the Internet at any location, while the percentage of people who have some high school education or a high school diploma use the Internet at any location is lower – 24.6% for some high school education and 20.9% for high school graduates. NTIA Study at 46.

The NTIA study did find that Blacks and Hispanics were not accessing the Internet at the same levels or as quickly as whites. *Id.* at 42. However, the study found that the groups (*i.e.*, Blacks and Hispanics) “with lower access rates at work or home are *much more likely to use the Internet at a public place such as a school, library, or community center*. They are also more likely to use the Internet to take courses or *to conduct job searches than other groups*” *Id.* (emphasis added).

The Commission's goal is to provide job vacancy information to a station's community – including minorities. The NTIA study suggests that it is precisely those individuals who are more likely to use the Internet to search for jobs.

While access to the Internet is not yet universal, it should not be rejected as an outreach tool. The Commission states that it is “not convinced that access via the public library is a widespread mechanism for prospective applicants to conduct a job search.” *EEO Order* at ¶ 86. As shown above, if a potential applicant has access to the Internet at the public library – or numerous other places – there apparently will soon be no other technique more useful for that applicant. Further, the BEDA program – or others utilized by broadcasters – would not simply rely on applicants knowing where to search the Internet for vacancies. The BEDA program consists of a cooperative between the stations, the state associations and NAB. The state associations, and stations to a certain degree, have agreed to promote the existence of their web sites through many means in order to increase knowledge and traffic, which in turn, increases usage and effectiveness.

Additionally, using the Internet for job searches is aided by a proliferation of sites that provide assistance and the information to those who are searching. For example, the *Washington Post* recently reported on a new online job search site that roams the Internet and collects all job vacancy postings and lists them in one place – all for free. *See Dog's New Job-Search Trick, Washington Post*, March 9, 2000 at E01. The new job bank site currently has identified more than half a million job openings and vows to have them all before its official launch on March 31, 2000. *Id.* The article cites the benefits of online recruiting for employers – namely that it will cost less and provide quicker results. *Id.* The benefits to potential applicants would be that all of the job vacancies could be listed in one place – or at most a handful of places – to search.

However, if broadcasters do not have an incentive to use the Internet as a recruitment tool (*i.e.*, Internet recruiting is recognized as a method of wide dissemination), it will never be effective. Currently, the Commission's rules do not give stations "credit" for implementing and using the Internet under either Option A or Option B. Even if the Commission believes that using Internet as the only method of recruitment is premature, it should reconsider its decision to exclude it completely and designate the Internet as a valid method (among many different methods) of widely disseminating job vacancy information.

**B. Compliance Is Possible With Reduced Recordkeeping Requirements.**

The Commission concludes that the recordkeeping requirements adopted in its *Order* are not burdensome because it provided increased flexibility to broadcasters to choose outreach methods and because electronic methods of keeping records and disseminating information can be used. *EEO Order* at ¶ 122. The increase in recordkeeping responsibilities is not justified by this reasoning.

The choice of recruitment options has no bearing on the recordkeeping because the Commission has outlined detailed and substantial requirements for both Option A and Option B. Stations are required to collect, but not submit to the Commission, listings of all job vacancies filled, recruitment sources used, contact information for each recruitment source, dated copies of all advertisements, letters, e-mails, faxes and other documentation used to fill each vacancy. *EEO Order* at ¶ 116. Additionally, under Option A, stations must maintain documentation to prove it has completed the required supplemental outreach efforts, the total number of interviewees and referral source for each interviewee, and the date each job was filled with the recruitment source for the hiree. *Id.* at ¶ 118. For Option B, stations must maintain data on the recruitment source, gender and racial/ethnic origin of all applicants for each full-time job filled in addition to the other records mentioned above. *Id.* at ¶ 119.

Merely having the ability to store documents electronically does not reduce the burden of collecting these records. It has always been a burden for broadcasters to collect the data on the race and gender of each applicant because it requires the broadcaster, in many instances, to ask the applicant. Again, just as the Commission cannot force minorities and females to apply for job openings, broadcasters cannot force applicants to designate their race and/or gender. However, it is this precise information that determines whether a station has complied with the EEO regulations under Option B of the new rules.

The Commission terminated its *EEO Streamlining* proceeding when it issued the *EEO Order* without adopting any of the proposals designed to provide relief for broadcasters. In the *EEO Streamlining* proceeding, the Commission asked for comment on whether to establish different qualifying criteria for exemption from EEO rules. *Streamlining Broadcast EEO Rules and Policies*, 11 FCC Rcd 5154 (1996) at ¶ 19 [hereinafter *Streamlining Notice*]. In the event that the Commission decided certain stations warrant relief from EEO rules, it described two ways to streamline the recordkeeping. It proposed to exempt qualifying stations from the recordkeeping and reporting requirements, so long as they otherwise complied with the EEO rules, or qualifying stations could elect to have their efforts evaluated either through their applicant data or participate in a minimum number of recruiting events each year. *Id.* at ¶¶ 23-24.

It is remarkable that, in a proceeding which began with the objective of *reducing* the burden of outreach requirements on stations, the Commission instead *increased* outreach, recordkeeping and FCC filing requirements. The Commission did not cite any record of failure by broadcasters to justify this astonishing reversal. While the new rules may provide some additional flexibility, all of the options offered by the Commission are at least as burdensome as



the prior rules, and Option A is far more so. The Commission should reconsider its decision and reduce all of these burdens on stations.

**C. The Commission Has Not Justified the Additional Reporting Requirements.**

With the new EEO rules came all the old reporting requirements plus a few new ones. Under the new rules, broadcasters have two annual reports, one biennial report, a report at renewal, and many more stations will have a mid-term review of their EEO efforts, and those reviews will be far more extensive. NAB believes the Commission has failed to justify these new reporting requirements in light of the overall record retention and reinstated reporting requirements.

**1. *There is no demonstrated need for the annual EEO Public File Report.***

The Commission's new annual EEO Public File Report is a new requirement that lacks a justifiable purpose. The Commission claims this new reporting requirement is necessary in order for the public to assist the Commission in monitoring the industry due to the Commission's scarce resources. *EEO Order* at ¶ 123. However, the record does not support this contention, particularly when the Commission is also instituting a new "Zero Tolerance Policy" which includes substantial audits and mid-term reviews for the industry.

Broadcasters have never been required to provide such a report, and the evidence presented in this proceeding does not indicate that the public will have any less opportunity to participate in monitoring the industry under the new rules than it did under the former rules. Additionally, there is no indication that broadcasters must be subjected to such a level of scrutiny based on any past behavior and in light of the other certifications, recordkeeping and enforcement provisions the Commission is imposing. Thus, the Commission should reconsider its decision to require the annual EEO Public File Report.

Under all circumstances, the Commission must eliminate its new requirement that broadcasters to post the EEO Public File Report on the station's Internet web page, if it maintains such a website. *EEO Order* at ¶ 124. Nowhere did the Commission propose this new reporting requirement or that broadcasters would be required to post any information on their websites.

The Commission has always maintained that the public file – and its contents – are intended to be available for the public that the station serves. It reiterated this reasoning late as last year in reconsidering the main studio and public inspection file rules. 14 FCC Rcd 11113 (1999) [hereinafter *Public File MO&O*]. In that proceeding, the Commission rejected arguments that the public file information should be accessible to parties outside of the service area through telephone requests. *Public File MO&O* at ¶ 15.

The same logic applies in the instant case. The FCC requires broadcasters *to reach out to the communities* that they serve with the information regarding its job vacancies. *EEO Order* at ¶ 77. It specifically notes that the “community” should have a role in monitoring the industry. *Id.* at ¶ 123. Under the public inspection file rules, the public file is maintained at a reasonably accessible location to the community of license. *See* 47 C.F.R. § 73.3526. And, even under the Commission's telephone accommodation rule, individuals within the service area of the station would have access to the report through the mail. Beyond these facts, there does not appear to be any other purpose or use for the report outside the service area of the station, nor did the Commission express any other need for the report information to be accessible to any one else. For this reason alone, the Commission must reconsider its requirement to post the EEO Public File Report on the Internet, if the station maintains a web site.

The Commission also should reconsider the Internet posting requirement because there are additional costs incurred to maintain content on a website for many broadcasters. Many

stations merely have a site that remains static and is only a conduit for people to listen to their audio over the Internet. The maintenance costs of such sites can be low to non-existent. Further, a number of broadcast station web sites are not controlled by the broadcaster itself, but instead provided by a separate entity under contract to the station. These stations may not have the right to insist that additional material be accessible through these web sites. Other stations may provide their web sites over commercial servers that assess charges based on the amount of material kept on the server. The Internet posting requirement would result in new costs for those stations.

The Commission's goal of providing the information to the community is met through maintaining the report in the public file of the station. Thus, there is no need to impose an Internet posting requirement, to do so will result in a lessening of speech and more burdens on broadcasters when the report is already accessible to the community.

Finally, the Commission mandates that broadcasters maintain an Internet posting to help their community monitor their efforts. However, it will not allow a broadcaster to use the Internet to recruit and provide outreach to that same community. The Commission's logic in this regard is baffling. The purpose of the EEO Public File Report is to provide the community with information regarding a broadcaster's efforts. The Commission has stated that the Internet is not a valid form of recruitment because it is not universal and many individuals in a station's community may not have access to job information posted on the Internet. Yet, it is unclear how the Commission can justify forcing a broadcaster to post its EEO Public File Report on the Internet without providing credit to the broadcaster who would like to use that same technology to recruit.

**2. *The Commission should reconsider its biennial certification if it maintains all of the other reporting requirements.***

The other new reporting requirement is a biennial Statement of Compliance (Form 397).

The Commission bases this new report on suggestions from NAB, AWRP and others of a method of enforcement for the EEO rules. *EEO Order* at ¶ 135. While NAB did propose a simple, certification of compliance every two years, this proposal was intended to be the only reporting requirement. NAB Comments in MM Docket No. 98-204 at 14.

As before, under the new rules broadcasters have an annual EEO Public File report that outlines their efforts over the last year, an annual Employment Report that documents the race and gender of full-time employees, and many stations will have to file reports with their mid-term review. And the Commission wants a Statement of Certification filed every two years that tells the Commission what method the broadcaster uses and whether it has complied with it for the last two years. These reports are redundant.

The Commission should reconsider the biennial certification altogether, if it maintains the other reporting requirements. However, as suggested by NAB, a biennial certification is appropriate under a system that asks broadcasters to certify compliance, but it is not necessary if broadcasters are documenting that compliance in an annual report that the Commission and the public can access. Thus, if the Commission retains the EEO Public File reporting requirement, it should eliminate the biennial certification requirement.

If the Commission is concerned about notification regarding what method a broadcaster uses to recruit, that information can be easily be sent to the Commission if, and when, a broadcaster chooses to change its election. Additionally, requiring stations to notify the FCC if there is a change also provides flexibility for stations if one method is not producing the proper outreach or the station finds its chosen option is too burdensome to remain in compliance. The Commission could retain the requirement that broadcasters may only elect to change its option

every two years, but not require the filing of a statement each time, unless the station is changing its mind.

The Statement of Certification is an unnecessary filing if the Commission retains the other reporting requirements. The Commission should reconsider its decision on these reports and streamline the requirements to diminish redundancy.

**3. *The Commission should modify or eliminate the Annual Employment Report (Form 395-B) requirement.***

NAB believes that the Commission should reconsider or modify the collection of the Annual Employment Report. In NAB's comments, we questioned the Commission's authority to collect the report because stations would be at risk if their "numbers" looked too low and that the Commission's use of the data to monitor trends could be viewed as an improper pressure on broadcasters to hire minorities and women.<sup>4</sup> NAB Comments in MM Docket 98-204 at 28. The Commission, however, decided to reinstate the requirement to monitor industry trends "during the next several years." *EEO Order* at ¶ 164.

Even though the Commission claims that its use of the reports will be benign, its stated intentions confirm NAB's fears. The Commission states that "an increase in the number or women and minorities employed in the broadcast and cable industries would indicate that our EEO requirements are effective in ensuring outreach." *EEO Order* at ¶ 164. This goal – if not reached by the broadcasting industry – would subject the industry to further review and

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<sup>4</sup> In fact, it is important to note that NAB questioned the Commission's authority to promulgate and enforce the EEO rules as proposed in its Notice due to constitutional issues. While the Commission has attempted to justify its new rules and ultimately determined they are constitutional, NAB reserves the right to pursue its constitutional and statutory arguments. This petition merely addresses recruiting, recordkeeping and reporting burdens that are apparent in the new rules – the modification of which may substantially reduce broadcasters' concerns.

alteration of the EEO rules. Alternatively, if the Commission sees increased in minority and female hiring, presumably some reduction of outreach requirements would result.<sup>5</sup>

The Commission also failed to consider alternatives that would ameliorate broadcasters' concerns on this issue. For example, if the Commission is only intending to use the data to monitor trends, there is no need to have stations identified on individual reports. The Commission could easily design a form that utilizes a "tear-off" sheet that separates the identity of a station with the data after the Commission verifies that the station has filed its form. This small alteration will avoid any misuses of the information either by the Commission or by other parties.

Additionally, monitoring trends could be done on a biennial basis as opposed to annually. In its *Non-Technical Streamlining* proceeding, the Commission reduced the Annual Ownership Report filing to a biennial requirement. See *Report and Order*, 13 FCC 23056 (1999) at ¶ 94. In the revised Ownership Report, the Commission also is collecting data on the race and gender of owners of broadcast stations. *Id.* at ¶ 105.

There is no need to have an *annual* report for employees if the Commission has already recognized that it can properly track trends on minority and female ownership on a *biennial* basis. The Commission's intent is the same in both instances – to monitor the industry. The Commission should streamline its reporting requirement and reduce the filing of the Annual Employment Report to a biennial filing.

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<sup>5</sup> The Commission specifically declined to designate a sunset for the EEO rules. *EEO Order* at ¶ 148. It believes that "broad and inclusive outreach measures help to deter discriminatory practices, by providing everyone with a chance to be considered for hiring opportunities." *Id.* While broad outreach does in fact provide opportunity, this is not a reason to continue EEO enforcement indefinitely. In light of the fact there is little evidence to show that discriminatory practices continue to exist, the Commission must limit the EEO rules by establishing a sunset.

**D. The New Enforcement Policies are Unnecessary.**

In addition to the new recordkeeping and reporting requirements, the Commission also has adopted a new “Zero Tolerance Policy” with regard to EEO enforcement. NAB believes that the policies set forth by the Commission are unjustified and unnecessary in light of broadcasters’ record of compliance.

The extent of the enforcement policies places broadcasters in a defensive mode when, over the last 30 years, broadcasters have worked to comply with the Commission’s EEO rules. The Commission has decided that broadcasters (1) must be monitored by their communities (EEO Public File Report); (2) must certify biennially that they have complied with the EEO rules; (3) must participate in a mid-term review (for TV stations and radio stations with 10 or more full-time employees); (4) are subject to random audits (including on-site); (5) be evaluated – on an industry-wide basis – through data contained in the annual employment report; (6) are subject to extensive EEO evaluation on an individual basis at renewal; and (7) are subject to complaints during the license term. *EEO Order* at ¶¶ 134 –147.

These enforcement provisions might be necessary if there were substantial evidence that the broadcasting industry as a whole had a history of discrimination. But that is not the case. The Commission appears to believe that broadcasters cannot be trusted and they must be subjected to detailed enforcement and reporting to ensure they follow the rules. For the last 30 years, broadcasters have complied and gains have been made within the industry. However, the Commission failed to recognize those facts.

The Commission should reevaluate whether all of these policies are necessary. For example, if 5% of the stations are audited every year and each station has a public file report of their efforts and biennial certification, is it necessary to impose a mid-term review? Alternatively, a mid-term review might be helpful if broadcasters are not subject to audits,

biennial certification, or an annual public file report. The Commission should reconsider its “Zero Tolerance Policy” and adopt enforcement measures that are reasonably tailored to the rules. In the broadcasting industry, there is no indication that any problem exists that justifies micromanaging broadcasters’ employment decisions.

### **III. CLARIFICATION POINTS**

#### **A. The Commission Should Clarify the Filing Schedule for Form 397.**

There is an inconsistency between the language of the *EEO Order* and the rule regarding filing of the new Statement of Compliance (Form 397). The Commission expects broadcasters to file Form 397 every second, fourth, and sixth year of the license term on the anniversary of the date they are due to file for renewal. *EEO Order* at ¶ 136. In fact, the text of the revised rule – which is effective on April 17, 2000 – explicitly defines these filing years. *See EEO Order* at Appendix C. However, implementation of this filing requirement is described differently in the text of the *Report and Order*. The text states that “[t]he first Statement of Compliance after the effective date of this Report and Order will be due June 1, 2000, to be filed by television stations in the District of Columbia, Maryland, Virginia, and West Virginia, whose licenses expire on October 1, 2004.” *EEO Order* at ¶ 143. The Commission expects to begin radio station filings one year later, on June 1, 2001 for the same group of states. *Id.* Each successive group of states follows on the anniversary of the renewal application filing deadline, with the next group of television stations filing by August 1, 2000.

However, if the Commission follows this implementation schedule, it is inequitable, confusing and contrary to the actual written rule. The following charts illustrate the results.



### Form 397 Filing – Television Stations

<b>Filing Date</b>	<b>States</b>
June 1, 2000	DC, Maryland, Virginia, West Virginia
August 1, 2000	North Carolina, South Carolina
October 1, 2000	Florida, Puerto Rico, Virgin Islands
December 1, 2000	Alabama, Georgia
February 1, 2001	Arkansas, Louisiana, Mississippi
April 1, 2001	Tennessee, Kentucky, Indiana
June 1, 2001	Ohio, Michigan
August 1, 2001	Illinois, Wisconsin
October 1, 2001	Iowa, Missouri
December 1, 2001	Minnesota, North Dakota, South Dakota, Montana, Colorado
February 1, 2002	Kansas, Oklahoma, Nebraska
April 1, 2002	Texas
June 1, 2002	Wyoming, Nevada, Arizona, Utah, New Mexico, Idaho AND DC, Maryland, Virginia, West Virginia (2d time)
August 1, 2002	California AND North Carolina, South Carolina (2d time)
October 1, 2002	Alaska, American Samoa, Guam, Hawaii, Mariana Islands, Oregon, Washington AND Florida, Puerto Rico, Virgin Islands (2d time)
December 1, 2002	Connecticut, Massachusetts, New Hampshire, Rhode Island, Vermont AND Alabama, Georgia (2d time)
February 1, 2003	New Jersey, New York AND Arkansas, Louisiana, Michigan (2d time)
April 1, 2003	Delaware, Pennsylvania AND Tennessee, Kentucky, Indiana (2d time)

### Form 397 Filing – Radio Stations

<b>Filing Date</b>	<b>States</b>
June 1, 2001	DC, Maryland, Virginia, West Virginia
August 1, 2001	North Carolina, South Carolina
October 1, 2001	Florida, Puerto Rico, Virgin Islands
December 1, 2001	Alabama, Georgia
February 1, 2002	Arkansas, Louisiana, Mississippi
April 1, 2002	Tennessee, Kentucky, Indiana
June 1, 2002	Ohio, Michigan
August 1, 2002	Illinois, Wisconsin
October 1, 2002	Iowa, Missouri
December 1, 2002	Minnesota, North Dakota, South Dakota, Montana, Colorado
February 1, 2003	Kansas, Oklahoma, Nebraska
April 1, 2003	Texas
June 1, 2003	Wyoming, Nevada, Arizona, Utah, New Mexico, Idaho AND DC, Maryland, Virginia, West Virginia (2d time)
August 1, 2003	California AND North Carolina, South Carolina (2d time)
October 1, 2003	Alaska, American Samoa, Guam, Hawaii, Mariana Islands, Oregon, Washington AND Florida, Puerto Rico, Virgin Islands (2d time)
December 1, 2003	Connecticut, Massachusetts, New Hampshire, Rhode Island, Vermont AND Alabama, Georgia (2d time)
February 1, 2004	New Jersey, New York AND Arkansas, Louisiana, Michigan (2d-time)
April 1, 2004	Delaware, Pennsylvania AND Tennessee, Kentucky, Indiana (2d time)

By April 1, 2003, every television station will have filed Form 397 at least once. Every radio station will have filed at least once by April 1, 2004. But, approximately 17 states (and territories) will have filed the form twice in that time frame before some states have even filed once.

If the text of the rule is followed the result is different. For example, June 1, 2000, is the first filing date for television stations in D.C., Virginia, West Virginia and Maryland because they are in their fourth year of their license term. The Commission failed to notice – or failed to indicate – that television stations in Wyoming, Nevada, Arizona, Utah, New Mexico, Idaho must also file Form 397 on June 1, 2000. These stations are in their second year of their license term. Under the new EEO rules, these stations are also subject to this filing unless the Commission specifically intended to phase-in this requirement as illustrated in the charts. If so, the Commission failed to specify its intention. If the Commission follows the letter of the rule, it does not appear that there will be stations that will have filed a certification twice before some stations file their first.

NAB respectfully requests that the Commission clarify its intentions regarding the Form 397 filing dates in order for all broadcasters to know when they must begin this requirement. NAB asks that the Commission resolve this issue through a separate clarification order or public notice as quickly as possible due to the rapidly approaching filing deadline.

**B. The Commission Should Establish a “Safe Harbor” for Broadcaster Compliance.**

The Commission claims that it is providing broadcasters with increased flexibility and discretion in choosing recruitment methods to fit the needs of the station. Under both options, a station is required to widely disseminate job vacancy information.

However, an inherent flaw in providing flexibility and discretion is defining when a broadcaster has achieved sufficient outreach. The Commission does not require a specific number of recruitment sources, only that the station must “widely disseminate” the job vacancy information. Is it enough if the broadcaster has periodic on-air advertisements and advertisements in the daily newspaper? Or, must a broadcaster also send notices to the local

colleges and schools and advertise in a weekly community publication? If the daily newspaper has a circulation that reaches all segments of the station's community, can a broadcaster claim wide dissemination merely by placing an ad for a week?

The Commission notes that the broadcaster has no control over who applies for a job opening, but merely requires wide dissemination. However, what the Commission says in one context is not what it provides in another. For example, the Commission expects that regardless of the chosen approach, a station must self-assess whether its efforts are productive – a broadcaster must analyze its data to see if modifications are necessary to achieve broad outreach to all segments of its community, including minorities and females. *EEO Order* at ¶ 114. This is where the disconnect between theory and reality lies.

In theory, it would potentially be enough for a broadcaster to place an advertisement in the local, daily newspaper and weekly community publications, send notices to local schools, and run on-air announcements because the combined effort of the circulation of the papers and publications, the notices in public schools and the on-air announcements could reasonably be expected to reach all segments of the community. However, in reality, that may not be enough. The broadcaster still must prove that minorities and females were reached with this information. The only way to prove that minorities and females were reached is to show they are present in applicant pools (under Option B) or interview pools (under Option A).<sup>6</sup>

The Commission should provide further guidance on how far broadcasters have to go to prove wide dissemination and proper outreach under the new rules.

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<sup>6</sup> NAB notes that under Option A, the only information on interview pools is the recruitment source from which the applicant was obtained and no information on race and gender. If a station always gets its interviewees from the daily newspaper (although the circulation may reach the entire community and, in theory, be acceptable recruitment), this presumably would be ineffective under the Commission's rules. If this is not a correct understanding of the Commission's intent, it should make that clear.

**C. The Commission Should Clarify Its Record Retention Requirements to Avoid Privacy Issues.**

The Commission notes that broadcasters must maintain records on applicant pools and interview pools to show compliance, depending on the method chosen. However, unlike the prior rules, broadcasters must prepare a report that describes these results and pools and place that report in the public file. Although the *EEO Order* clearly states the station must provide the recruitment source for each interviewee, it is unclear what specific information is required. For example, does the EEO Public File Report require a listing of the names of interviewees? Or is it merely a record of the number of interviewees with a list of the sources from which they came? The Commission must clarify its intent in order to avoid potential privacy issues.<sup>7</sup>

**D. The Commission Should make Clear Whether It Intends to Preempt State Laws.**

Under the former EEO rules, all broadcasters were required to maintain data on the race and gender of each applicant for every position. This federal requirement was always interpreted to preempt any state laws that prohibited the collection of race and gender data. Under the new rules, since race and gender data is only required for stations that choose Option B, it may be argued that the state laws are not inconsistent with the federal scheme since broadcasters could choose Option A. If the Commission intends that Option B be available to all stations, regardless of whether a particular state permits the retention of race and gender data, it should explicitly

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<sup>7</sup> For example, many people may apply for a job while they are employed elsewhere and without informing their employer that they are investigating other jobs. If the names of rejected interviewees were made public, applicants would be discouraged from applying to broadcast stations for fear of repercussions at their present jobs. Of course, if this information also must be placed on the Internet, the problem would be exacerbated. The FCC should avoid reporting requirements that would have the effect of impairing outreach efforts.

state its intention to preempt state laws. *See Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141, 154-55 (1982).

**E. The Commission Should Clarify How Joint Recruitment Efforts Are Counted Under the New Rules.**

The Commission encourages broadcasters to participate in joint recruitment efforts in order to lessen burdens under Option A. Generally, this would cover any state association efforts or programs that stations utilize. However, there are other joint recruitment measures where the Commission failed to adequately define if they would count. One example involves joint job fair sponsorship. If a group of stations (either commonly-owned or otherwise) wanted to host a job fair in the community, would the co-sponsorship count for each of the stations?

Another issue relates to programs sponsored by group owners. If a station group sponsors a scholarship program for potential broadcasters, can all stations in the group count that program as one of their outreach efforts? Similarly, if a group owner has a mentoring or training program that is open to all employees, but the training only takes place at certain stations, would that be deemed to be an outreach effort by all stations in the group. The FCC should clarify how outreach efforts that involve multiple stations will be counted under Option A.

**F. The Commission Should Clarify the Recruiting Exemptions.**

The Commission provided far few exemptions from requirements to recruit for every opening. Those exemptions include the occasional exigent circumstance (*i.e.*, where an essential employee leaves without notice), internal promotions and temporary hires. *EEO Order* at ¶ 89. The Commission expects that nonrecruited hires will be rare relative to the number of recruited hires. The Commission failed to recognize another possible exemption that is particular to the broadcasting industry – special talent hires. The traditional form of recruiting does not lend itself to these circumstances. A special talent exemption would be focused on the unique abilities of a

particular individual regardless of the person's race or gender, limited to on-air talent, and would not be routinely used. The Commission should recognize that this situation sometimes presents itself and clarify its new rules to include this limited exemption.

Further, the Commission also failed to clarify how a broadcaster must conduct recruitment for positions if it does not want to inform the current employee of the termination of his or her contract or employment status until a replacement is found. Again, this exemption would be limited and not intended as a routine occurrence. The Commission should clarify its recruiting exemptions to recognize this circumstance.

#### IV. CONCLUSION

For the foregoing reasons, the Commission should act to reconsider and clarify the portions of its *EEO Order* discussed herein.

Respectfully submitted,

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March 16, 2000

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Statement by John Anthony, Co-Owner and General Manager PAR Broadcast Group

I believe the new EEO requirements issued by the FCC will adversely affect radio broadcasters in terms of time spent, and paperwork details, especially on the small market broadcasters who must meet the same requirements as the larger markets, although those of us in the small markets also must often function as a newsman, sports play-by-play, DJ, engineer, and even janitor.

While I understand the need to recruit for the best qualified candidates, I don't need the FCC telling me how to advertise job openings. Broadcasters WILL hire the best person and the most qualified for the job regardless of their race or gender; not someone just to meet the EEO requirements. We're not prejudiced. We are just businessmen seeking the BEST people available in the work force; and we don't need the FCC to "tie our hands"

Our community has no African-Americans and only a few Hispanics—certainly FAR less than the five percent minority population. But the new regulations will require us to prepare an EEO recruitment program for minorities when they aren't any around here!

Previously, I could fill out the appropriate FCC form listing full and part-time employees, including their gender, in 15 to 30 minutes. And when we had an opening, I'd keep a thorough file including job description, where it was listed, and responses received. I'll estimate it'll take four to five HOURS to do the documentation required for recruitment, record-keeping, and reporting to be in compliance with the new EEO. That's time I don't have when considering all the other management/employee duties that I have.

In closing, the new EEO is just another example of how big government is trying to run our businesses. We are having to spend more time as "lobbyists" rather than running our stations to serve the public interest.

Thank You

John Anthony



**KTTN  
CLASSIC  
HIT COUNTRY**

**Soft Hits...am**





# WCLT RADIO

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NEWARK, OHIO 43050-5150  
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March 15, 2000

## To Whom It May Concern

WCLT Radio Inc. has owned and operated two radio stations (WCLT-FM and WCLT) from the same location in Newark, Ohio for over the past fifty years and I have been privileged to be here from the beginning. Being of sound mind and a somewhat creaky body I want to share my thoughts with you concerning the state of radio broadcasting today with particular attention to the new EEO rules set forth by the FCC.

At the present time, our staff includes 25 full-time and 7 part-time employees. Our full-time staff is almost evenly split between male and female; 12 females and 13 males. One of the females is black.

Since we are in a small to medium market each employee departure is a crisis unto itself. We cannot do what our Jacor and Clear Channel neighbors, some 35 miles to the west of us do . . . call all of the nearby stations and raid their employee roster. We ARE one of those nearby stations! We can't look down the food chain to find a supply of employment candidates from yet smaller stations than ourselves. Mighty poor fishing.

What we can and do immediately upon learning that we have a vacancy coming up is call our fellow broadcasters around the state . . . and sometimes beyond . . . to see if they have any applicants in their files who are seeking employment in the broadcast field.

At this point I must comment on the EEO Report and Summary that states "word of mouth and old boy network recruiting techniques are unacceptable." That's like saying that you can't run to your neighbors for help if your house is on fire. When we call our fellow broadcasters for any applicants who have visited their stations seeking employment we are hoping to find a name and phone number of someone who obviously wants to be in the broadcast business. If we get any names from this effort (and, in truth, it doesn't happen very often) we try to reach those people to invite them to a job interview.

Now, that's just the first step in our employee-seeking process. We immediately activate our Job Announcement procedure which includes newspaper ads in local and Columbus Ohio papers. Letters go out to all Ohio colleges and universities with an announcement of our job opening. We post our opening with the Ohio Association of Broadcasters where it is added to their Internet presence. There aren't many broadcast "schools" left in Ohio but we do contact the ones still in business. And of course we use our own media to invite applicants to get in touch with us. Some 27 different venues to try to find a replacement. And still you may come up dry.



WCLT  
The Information  
Authority!

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Many of the above efforts were mandated by earlier EEO rules. We still go through the motions at each employee opening and continue to send letters to places where we never get any return information(in our own stamped and addressed envelopes).

It is frustrating to make personal calls to many of these operations only to receive lip service but no cigar. Our files are bulging with paper trails from earlier efforts . . . most of them fruitless as far as finding someone who wants to join our company. This is a huge burden on our limited staff. On the one hand we do this out of a sense of compliance with existing required regulations while at the same time trying to find someone who wants a job in the real world around us.

That real world is very different from the one suggested by the EEO Report. Come to our town and talk with Kelly Services and other employment agencies about their problems finding help for business and industry. Learn about the sad state of talking with prospective employees who agree to go see a business that has a job opening and then never show up. Or take our case of spending three weeks training a new employee only to have him not show up for work after two days. A phone call two days later said he had gone to Louisville KY and wouldn't be back.

Does anyone in Washington believe we ARE NOT trying to find new employees? The list of measures in Option A assumes that our program director, Sales Manager, GM and myself(who compose "those with most responsibilities for job hiring" to quote the Report and Summary) have adequate spare time to create and participate in some of them. Let's say we set up a job fair to extol the careers in broadcasting. We meet with people and tell them about our business and what it takes to get into it. They get excited and say that's what they want to do and when can they come to work. At this point, red-faced, we say "well, right now we don't have any openings but we'll take your name and application." Later, when a job opening occurs phone calls to these people result in no one at home or they already have a job somewhere else and don't want to give up seniority there to come work with us.

When we do have an opening, our focus is on getting it filled now . . . and there is no time to go about setting up a job fair during this present crisis. The EEO demands are simply not in tune with the real world situations that we find ourselves in as broadcast station operators. Sure we talk with school groups, church groups, any youth groups we can find who want to hear about our business. We are proud of the place local broadcasters have in community life and we are constantly keeping an eye out for prospective job candidates.

Participation in any or all of the suggestions outlined in Option A looks wonderful on paper. However, it makes little sense to create a desire for broadcasting employment when there is no immediate opening available. Couple that with the fact that Ohio's colleges and universities annually graduate more students, male and female, black, white and other colors of the rainbow with Communication degrees than the entire radio broadcast industry will hire in a single year. That is why I tell students when I talk with them (yes, I and my senior staff do talk with student groups and others) that



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they must take courses that will let them get into areas of marketing and promotion and into industrial and commercial corporate organizations that have employee publications and other employee relations departments. Radio station annual openings are far less than the on-going pool of graduates across our land. And, frankly, many of the other opportunities I listed above carry higher pay scales than radio markets such as ours can offer.

In summary, all of the job fairs, seminars, career days, workshops, etc. that we might have participated in during all of 1999 will be of no help to me in finding a replacement for the employee who told me this morning that she is leaving for a higher paying position in Columbus Ohio. The people who attended those events are long gone. They are already in the nation's workforce somewhere else. My job is to start turning over all the rocks in our area in the hope of finding someone who is not working but who really wants a job . . . or someone working somewhere else in another field who would like a change of career. With luck and perseverance we just might find one.

As to the demand that those of us who have web sites must post our EEO public file on them I consider that just one more bit of harassment dreamed up by people who have nothing else to do but create new regulations as support for the importance of their own job continuance.

Sincerely,



Robert H. Pricer  
CEO WCLT Radio Inc.



## **ATTACHMENT B**

## Side-by-Side Comparison of EEO Regulations

The following chart provides a comparison of the EEO rule requirements prior to the *Lutheran Church* decision (*i.e.* Old EEO Rules) and the New EEO Rules adopted by the FCC on January 20, 2000. The charts show a side-by-side comparison of the recruitment, recordkeeping and reporting requirements.

OLD EEO RULES	NEW EEO RULES
<p><b><u>Recruitment</u></b></p> <ul style="list-style-type: none"> <li>❑ Stations with five (5) or more full-time employees must recruit for all job vacancies (including lower-level employees).</li> <li>❑ Recruitment is conducted specifically for minorities and females using targeted recruitment sources.</li> <li>❑ Stations in markets with less than 5% minority population are exempt from having an EEO recruitment program for minorities.</li> </ul>	<p><b><u>Recruitment</u></b></p> <ul style="list-style-type: none"> <li>❑ <b>Basic Obligation:</b> Licensees subject to the EEO Program requirements (<i>i.e.</i> those stations with five (5) or more full-time employees) must widely disseminate information concerning each full-time job vacancy (including all lower-level employees).</li> <li>❑ <b>Stations must also choose between Option A or Option B, below</b></li> </ul> <p><b>OPTION A</b></p> <ol style="list-style-type: none"> <li>1. Stations must provide notice of openings to qualifying organizations that request such notice; and</li> <li>2. Participate in longer-term recruitment initiatives within a two-year period. Stations with five to 10 full-time employees must complete two initiatives. Stations with more than 10 full-time employees must participate in four initiatives.</li> </ol> <p><b>OPTION B</b></p> <ol style="list-style-type: none"> <li>1. Stations must design their own broad and inclusive outreach program; and</li> <li>2. Demonstrate that they are widely disseminating information concerning job vacancies by analyzing the recruitment sources, race, ethnicity and gender or the applicants attracted by their recruitment efforts.</li> </ol> <ul style="list-style-type: none"> <li>❑ Stations in markets with less than 5% minority population <b>are not</b> exempt from having an EEO recruitment program for minorities.</li> </ul>

## **Recordkeeping**

- ❑ For each job vacancy, stations must have documentation on: job title and classification, recruitment sources used, # of minority/female applicants, copies of all ads and methods of notice of vacancy, documentation re: recruitment sources (cards, letters and memos on phone conversations).
- ❑ Documentation kept in station files – not in public file

## **Recordkeeping**

### **OPTION A**

Stations must collect, but not routinely submit to the Commission: (i) listings of all full-time jobs filled, identified by job title; (ii) the recruitment sources used to fill each vacancy, including any organizations which requested notification; (iii) the address, contact person and telephone number of each recruitment source used to fill each position; (iv) dated copies of all advertisements, letters, e-mails, faxes, etc. used to fill each vacancy; (v) documentation necessary to demonstrate performance of supplemental outreach initiatives, e.g. job fairs, mentoring programs; (vi) the total number of interviewees for each vacancy and the referral source for each interviewee; (vii) the date each job was filled and the recruitment source that referred the hiree.

### **OPTION B**

Stations must collect, but not routinely submit to the Commission: (i) listings of all full-time jobs filled, identified by job title; (ii) the recruitment sources used to fill each vacancy; (iii) the address, contact person and telephone number of each recruitment source used to fill each position; (iv) dated copies of all advertisements, letters, e-mails, faxed, etc. used to fill each vacancy; (v) data reflecting the recruitment source, gender, and racial/ethnic origin of applicants for each full-time job filled.

## **Reporting**

- ❑ **Form 395-B** (filed annually with FCC)
- ❑ **Form 396** (filed at renewal with FCC)
- ❑ **Form 396-A** (filed with any construction permit, assignment, or transfer application)
- ❑ **Mid-term Review** (TV stations only – limited to comparing Form 395-B report with workforce percentages)

## **Reporting**

- ❑ **Initial Statement of Election** (filed once)
- ❑ **EEO Public File Report** (Annual report to public file, filed with FCC at mid-term review and at renewal. It also must be maintained on the station's webpage, if they have one).
- ❑ **Statement of Compliance (new Form 397)** (filed every two years)
- ❑ **Form 396** (filed at renewal with FCC)
- ❑ **Form 395-B** (filed annually at FCC, but not kept in public file)
- ❑ **Form 396-A** (filed with any construction permit, assignment, or transfer application)
- ❑ **Mid-term Review** (TV stations and radio stations with more than 10 full-time employees)